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Supreme Court, U.S.
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No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITIONER'S REPLY BRIEF

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

The Brief in Opposition ("Opp.") perfectly illustrates the need for this Court's review. It reflects the widespread confusion and debate as to the meaning of *State Farm Mutual Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). It champions positions that not only are the subjects of splits of authority but will have grave practical consequences if permitted to persist.

Respondent simply ducks the first question presented: whether a finding of high reprehensibility can "override" the lack of a reasonable relationship between punitive and compensatory damages. She not only declines to defend the Oregon Supreme Court's holding in that regard but fails even to acknowledge it. Perhaps because that ruling is indefensible and implicates a conflict, respondent instead attacks a straw man, noting repeatedly that reprehensibility is the most important indicium of excessiveness and that *State Farm* established no "bright line test" for acceptable ratios. Those uncontroversial propositions are not at issue here.

With regard to the second question presented, respondent – like the Oregon Supreme Court – fails to recognize the distinction drawn by this Court between punishing the defendant for causing harm to others not before the court and considering that harm for purposes of assessing the reprehensibility of the specific conduct that injured the plaintiff. Evidence of similar wrongs plays a role comparable to that of recidivism in the criminal context, which may be relevant in determining where, within a permissible range of criminal sentences, a particular defendant's sentence should lie for the particular crime at issue. Just as recidivism may enhance the sentence for a crime but cannot be used to impose punishment for earlier crimes, punitive damages may not punish for the alleged harms to others. Under *State Farm*, evidence of similar wrongs may never justify a puni-

tive damages award that exceeds the maximum ratio permitted by due process. *Id.* at 423. Respondent and the Oregon Supreme Court, however, would allow the punitive damages proceeding in an individual case to serve as a pseudo-class action, in which punishment is imposed on behalf of all in-state residents allegedly harmed by a course of conduct – despite the fact that each remains free to sue on his or her own behalf, and despite the absence of the safeguards associated with a true class action. Respondent's brief eliminates any doubt that this important, recurring issue is squarely presented here.

In addition, like the court below, respondent defends a toothless form of "de novo" review. But her claim that taking all facts in the light most favorable to the plaintiff reflects a "respect for jury findings" fails to come to grips with the fact that the jury in this case ***made no findings*** relevant to the size of its punitive award. That is a pervasive issue in punitive damages cases, and it is the subject of a conflict with a recent decision of the Supreme Court of California.

Review is particularly necessary here. The Oregon Supreme Court has never reduced a punitive award. Its decision in this case – reaffirming, after a GVR from this Court, a punitive award that is nearly ***100 times*** the size of respondent's substantial compensatory award – disregards *State Farm* and declares that there are no limits at all on punitive damages when a court deems conduct to be reprehensible. It is an affront to due process and to the rulings of this Court.

Finally, the "enormous potential liability" at issue in this case is itself "a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust* v. *Kehoe*, 126 S. Ct. 1612 (2006) (Scalia, J., concurring in the denial of certiorari). If review is denied, petitioner will face a $130,000,000 judgment (including interest) in an individual-plaintiff case, based on the Oregon Supreme Court's insupportable reading of *State Farm*. That should not be permitted to occur.

A. The Question Whether The Ratio Guidepost May Be "Overridden" Is Squarely Presented, Is The Subject Of A Split Of Authority, And Is Recurring And Important.

From reading respondent's brief, one would never know that the court below expressly acknowledged that the massive judgment under review fails to satisfy the requirements of the ratio guidepost. Nor does respondent's brief contain a single word about the Oregon Supreme Court's holding that "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." Pet. App. 33a.

Respondent's silence is understandable. The framework adopted by the Oregon high court, in which reprehensibility can "override" the reasonable-relationship guidepost, cannot be reconciled with the holdings of this Court or the holding of the Ninth Circuit in *Planned Parenthood of the Columbia/Willamette* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005).[1] Respondent asserts uncontestable platitudes such as "reprehensibility remains the most important indicium of whether a punitive damage award is unconstitutionally excessive" and "*State Farm* does not hold that punitive damages must conform to a single-digit ratio." But the question presented is not whether the reprehensibility

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[1] Respondent's half-hearted effort (Opp. 17) to minimize the conflict with the Ninth Circuit fails. *Planned Parenthood* clearly recognized that the ratio guidepost cannot simply be ignored because the other two criteria identified in *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) favor a high award. It held that, in most cases, the maximum constitutionally permissible ratio will be somewhere between 1:1 and 9:1 and that the reprehensibility and comparable-penalties guideposts determine where along that spectrum a particular case will fall. 422 F.3d at 962. The decision of the Oregon Supreme Court in this case is in direct conflict with the Ninth Circuit's framework.

guidepost is more important than the other guideposts or under what circumstances ratios greater than 9:1 might be "reasonable." Rather, the question presented by the petition and the ruling below is whether a court's subjective determination of high reprehensibility "overrides" the requirement that there be a reasonable relationship at all. As shown in the petition (and the brief of amicus Product Liability Advisory Council), that issue is worthy of this Court's review.

The disarray in the lower courts is well illustrated by comparing the decision here with *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598 (8th Cir. 2005). In that suit against a tobacco company for injuries allegedly caused by smoking, the court found that the defendant's conduct was "highly reprehensible." *Id.* at 602-603. Unlike the Oregon Supreme Court, however, the Eighth Circuit applied *State Farm* faithfully. It held that – high reprehensibility notwithstanding – a ratio of 1:1 was the most that due process would sustain, given the high compensatory damages. Obviously no two cases are exactly alike, and (as we acknowledged in the petition) there is no such thing as a one-size-fits-all ratio. But a legal regime that approves ratios varying nearly a hundredfold in two comparable cases involving similar, "highly reprehensible" conduct by two similarly situated defendants is one that needs attention.

Against that backdrop of inconsistent holdings, the Oregon Supreme Court's ruling is particularly dangerous. It says that, when conduct can be characterized as highly reprehensible, there need not be a reasonable relationship between compensatory and punitive damages at all. If *BMW* and *State Farm* mean anything, they must foreclose that holding.

Respondent suggests (Opp. 21) that this case might not be a good vehicle because "[f]ewer than half the states permit punitive damages in wrongful death cases." In addition to being irrelevant (the Oregon Supreme Court's broad holding is in no way limited to any particular cause of action), that

assertion is wrong: a clear majority of the states that allow punitive damages ***at all*** permit them in wrongful death cases. The list includes states in all but two Circuits. Richard L. Blatt, *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE §§ 7.11-7.60 (2005).[2]

Whether wrongful death cases – or some other category of disputes – provide a context in which higher ratios may be reasonable is a subsidiary issue that also has engendered confusion in lower courts. This Court has never said that they do, and its decisions suggest otherwise. But regardless, those matters are not relevant to the certiorari analysis. They are properly addressed at the merits stage, if at all.

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[2] Respondent also offers a law-and-economics argument in favor of high ratios in wrongful-death cases. See Opp. 18-22. That argument is beside the point, because the Oregon Supreme Court did not rely on any peculiarities of compensation for wrongful death in issuing its doctrinal holding. To the contrary, the holding here – the proposition for which this case will be cited – is that high reprehensibility can override a finding that the relationship between punitive and compensatory damages is not reasonable. In any event, respondent's theory is unsupported by the very authorities she cites. Polinsky and Shavell, for example, conclude that "[p]unitive damages should not be awarded to correct for inadequate compensatory damages." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 942 (1998); see also W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 314 (1998) ('punitive damages in such instances create inefficiencies"); Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 31 (1982) ("If the absence of a market makes it impossible for courts to determine the value of a loss, it likewise makes it impossible for them to determine the amount of punitive damages that would produce an efficient level of deterrence.").

B. The "Harm To Others" Question Is Squarely Presented, Is The Subject Of A Circuit Split, And Is Recurring And Important.

As an initial matter, respondent's suggestion that petitioner waived the second question presented is baseless. All petitioner "conceded" in its proposed jury instruction was the proposition that harm to others can be relevant to reprehensibility – an accurate statement of the law. Respondent is again confusing consideration of harm to others for its bearing on reprehensibility with directly punishing for such harm. In fact, the proposed instruction drew the very distinction that we draw here, and that is the clear import of *State Farm*: The jury may consider the scope of the defendant's conduct in evaluating the reprehensibility of the acts that harmed the plaintiff (*i.e.*, it may use the course of conduct as a basis for selecting a punishment higher in the range of permissible punishments for the harm to the plaintiff), but it may not ***punish*** the defendant for harms to nonparties (*i.e.*, it may not use those harms as a basis for exceeding the range of permissible punishments for the harm to the plaintiff).

This Court has repeatedly reaffirmed not only the existence of this distinction but its importance in the law. In the criminal context, this Court has upheld the constitutionality of recidivism statutes which enhance the sentence for a crime based on the defendant's prior criminal activity. In so doing, this Court made clear that punishing for prior criminal activity would be unconstitutional. Enhancing the sentence imposed for the particular crime because of the defendant's repeated criminal conduct is permissible, within the statutorily prescribed range for the offense of conviction, because the prior conduct makes the crime more reprehensible and increases the need for a stiffer sentence to deter future criminal conduct. *United States* v. *Watts*, 519 U.S. 148, 154 (1997). Similarly, just as recidivism cannot be used to impose punishment for earlier conduct, punitive damages may not punish for the alleged harms to others. Indeed, the *State*

Farm Court was careful to limit the extent to which harm to others can be considered, stating that courts may not "adjudicate the merits of other parties' hypothetical claims under the guise of reprehensibility analysis." 538 U.S. at 423. Thus, injuries incurred by nonparties cannot justify a departure from the requirement of proportionality between the punishment and the harm to the plaintiff. Respondent's (and the Oregon Supreme Court's) apparent belief that punishing for harm to others is no different from considering that harm in assessing reprehensibility serves only to confirm the need for guidance and clarification from this Court.

In the end, respondent is left to argue that this Court should deny certiorari because the Oregon Supreme Court was correct in holding that it is perfectly acceptable to use a single punitive award in an individual plaintiff's trial to punish for harm to all residents of the state. As noted in the petition (at 19), the Supreme Court of California and the Eighth Circuit disagree with that position. The issue thus could not be more squarely joined.

Nor could it be more important. As amicus the Chamber of Commerce of the United States explains, the "total punishment" approach embraced by respondent and the court below invites excessive, multiple punishment. In that regard respondent's reference to "the vulnerability of ***the class*** of addicted consumers" (Opp. 13 (emphasis added)) is telling. As much as respondent (and the Oregon Supreme Court) might wish to treat it as one, this case was not a class action, and therefore petitioner lacked the procedural protections attendant to one.

The problem cannot be solved by the prospect of future "credits" for paid awards. See Opp. 15, 26 n.8. As Professor Colby has explained:

> When a defendant engages in a course of conduct that allegedly harms a large number of people, ***many of the alleged victims, if they bring their own***

> ***lawsuits, will not prevail***, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003) (emphasis added; footnote omitted). In that event, there will be no occasion for the defendant to receive "credit" for the earlier punitive award; nor can there be any justification for allowing a single jury to punish for harm to others for which other juries have exonerated the defendant. Indeed, the California Supreme Court has observed – in a case that conflicts directly with the decision below – that forcing defendants to play this high-stakes game of roulette "present[s] a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005). This problem is not just hypothetical. In a significant majority of smoking-and-health cases that have gone to trial, juries have ruled in petitioner's favor. The impropriety of nonetheless allowing a single jury to punish petitioner as if it were legally liable to all potential plaintiffs in the state should be plain.

As a practical matter, moreover, the court that upholds the first large verdict has no way of ensuring that other juries and/or courts will adequately protect the defendant from excessive multiple punishment. The "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts might be unwilling to limit a plaintiff's recovery simply because another plaintiff already received a punitive award. See *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967). On the other hand, depriving subsequent plaintiffs of the right to pursue punitive damages would trigger unseemly races to the courthouse.

This Court should grant certiorari to determine whether the Oregon Supreme Court is correct that punitive damages can be awarded as punishment for conduct that harmed non-parties, a question of pressing importance that is the subject of a conflict of authority.

C. The Lower Courts Require Guidance As To Implementation Of De Novo Review – An Issue That Arises In Every Punitive Damages Case.

Respondent's claim that the third question presented was not preserved is specious. Petitioner has argued at each level of appellate review that the practice of Oregon courts of deferring to assumed findings of fact by the jury is inconsistent with a court's constitutional duty to conduct its own independent review of the punitive damages award.[3]

Respondent's substantive responses fare no better. Her chief argument on this point is that Oregon should not be required to "abandon its respect for jury findings." Opp. 29,

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[3] *See* Respondent's Brief and Opening Brief on Cross Appeal at 52 ("After *Cooper Industries*[, *Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)], the rational juror standard or any similar standard appropriate for reviewing a finding of fact does not ensure constitutionally adequate review of a punitive damages award."); Petition for Review at 19-22 ("When read together, *BMW* and *Cooper Industries* indicate that the rational juror standard gives more deference to the jury's determination than the federal constitution permits."); Response to Petition for Review at 15 n 7 ("If defendant means to suggest that the appellate court reviews the *jury's decision* de novo, defendant is wrong."); Petition for a Writ of Certiorari at 14-15 ("Oregon's failure to exercise meaningful judicial oversight of punitive damage awards is compounded by an application of its overly lax standard of review to 'findings' that the jury did not make but that a court speculates a jury could have made."); Brief on Remand from the United States Supreme Court at 17 (arguing for a de novo standard of review, this time as required by *State Farm*).

27. What respondent seems to miss is that the jury made no specific findings that would bear on the *BMW* guideposts. See *Cooper Industries*, 532 U.S. at 437. A large award of punitive damages is like a Rorschach blot, from which many different meanings can be discerned. It makes no sense to infer from the size of the award findings that the jury did not make. See Pet. 24-26. Respondent offers no response to this argument. Nor does she address our discussion of *BMW*, *Cooper Industries*, and *State Farm*, each of which involved an independent review of the record.

Instead, she attempts to characterize the case with which the holding below conflicts – *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005) – as a narrow decision in which the California Supreme Court ruled only that "the appellate court erred in presuming the size of the actual loss from the size of the punitive damages verdict." Opp. 27 n.9. But the decision in *Simon* was far broader: the court expressly stated that "[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide" whether the fact at issue was established in the record. 113 P.3d at 72. That requirement of "independent" review stands in stark contrast to Oregon Supreme Court's repeated assertion that a court applying the *BMW* guideposts should "construe all facts in favor of the plaintiff, the party in whose favor the jury ruled." Pet. App. 23a, 2a. The California Supreme Court's procedure takes de novo review seriously, while the Oregon Supreme Court's approach is a rubber stamp. This Court should step in to resolve this important conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
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